

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, (b) (6))
Headquarters and Headquarters Company,)
U.S. Army Garrison, Joint Base Myer-)
Henderson Hall, Fort Myer, VA 22211)

**RULING: DEFENSE MOTION
TO DISMISS ALL CHARGES
WITH PREJUDICE**

DATED: 25 April 2012

Defense moves under RCM 701(g)(3)(D) to dismiss all charges with prejudice for discovery violations. The Government opposes. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings and the Law: The Court adopts the findings of fact contained in its Ruling re: Motion to Compel Discovery (AE) and the Law described therein.

Conclusions of Law:

1. In trial by general court-martial in the military justice system, charges are preferred against an accused, the charges are investigated by an Article 32 investigating officer, and forwarded with recommendations to the convening authority who makes a decision whether to refer the case to trial. RCM 307, 405, 406, 407, 504, and 601.
2. In this case the original charges were preferred on 5 July 2010 and dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. The Article 32 investigation was held 16-22 December 2011. The convening authority referred the current charges to trial by general court-martial on 3 February 2012.
3. Unlike trials in Federal District Court, a military judge is not detailed to a court-martial until the case is referred. This case was referred on 3 February 2012. Article 26(a), UCMJ.
4. RCM 701 and RCM 703 govern discovery and production of evidence after a case has been referred for trial by the Convening Authority and a military judge has been detailed.
5. The President promulgated RCM 701 to govern discovery and RCM 703 to govern evidence production after referral. The rules work together when production of evidence not in the control of military authorities is relevant and necessary for discovery. *U.S. v. Graner*, 69 MJ 104 (C.A.A.F. 2010). The requirements for discovery and production of evidence are the same for classified and unclassified information under RCM 701 and 703 unless the Government moves for limited disclosure under MRE 505(g)(2) or claims the MRE 505 privilege for classified information. If the Government voluntarily discloses classified information to the defense, the protective order and limited disclosure provisions of MRE 505(g) apply. If, after referral, the

Government invokes the classified information privilege, the procedures of MRE 505(f) and (i) apply.

6. From the 8 March 2012 Government response to Defense Motion to Compel Discovery and its email of 22 March 2012, the Court finds that the Government believed RCM 701 did not govern disclosure of classified information for discovery where no privilege has been invoked under MRE 505. This was an incorrect belief. The Court finds that the Government properly understood its obligation to search for exculpatory *Brady* material, however, the Government disputed that it was obligated to disclose classified *Brady* information that was material to punishment only. The Court finds no evidence of prosecutorial misconduct.

7. Although the RCM and military case-law encourage early and open discovery, the Defense does not have a right to discovery under RCM 701 or *Brady* prior to referral on 3 February 2012.

8. Most of the information contained in the damage assessments requested by the Defense is maintained by other government agencies. To obtain such information from other Government agencies under RCM 703(f)(4)(A), whether discoverable under RCM 701 or not, requires the Defense to show relevance and necessity. The Government does not have authority to compel production of evidence from other government agencies under RCM 703(f)(4)(A) until after referral.

9. As the Court held in its 23 March 2012 ruling re: Motion to Compel Discovery, the fact that information controlled by another agency is discoverable under RCM 701 may make such information relevant and necessary under RCM 703 for discovery.

10. The Government has requested 13 departments, agencies, and commands to segregate and preserve records involving Wikileaks and requested information potentially discoverable from more than 50 additional agencies. This is a complex case involving voluminous classified information in the custody of multiple government agencies who have national security concerns with the disclosure of this information. As of 12 April 2012, the Government has produced 2,729 unclassified documents, consisting of 81,273 pages, and 41,550 classified documents totaling 336,641 pages. To secure this release, the Government coordinated with multiple government agencies to issue protective orders under MRE 505(g) and court orders for release of grand jury matter.

11. It is not unreasonable for Government agencies possessing potentially discoverable classified information to await the detail of a military judge to litigate issues of relevance, materiality, and necessity, and, subsequently, to litigate issues arising under MRE 505 and MRE 506 prior to releasing classified discovery to the Trial Counsel to disclose to the Defense.

12. The Defense moved to compel the discovery it desires on 14 February 2012, 11 days after referral. On 23 March 2012, the Court ordered the Government: to immediately begin the process of producing the damage assessments for *in camera review* to assess whether they are favorable or material to the preparation of the defense under RCM 701(a)(6), RCM 701(a)(2), and *Brady*; to immediately cause an inspection of the 14 hard drives; to contact DOS, FBI, DIA, ONCIX, and CIA to determine whether any of these agencies contain any forensic results or

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investigative files relevant to this case; to advise the court by 20 April 2012 whether it anticipates any government entity that is the custodian of classified information subject to the defense motion to compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c); and by 18 May 2012 to disclose any favorable unclassified information from the 3 damage assessments to the Defense and all classified information from the 3 damage reports to the Court for *in camera* review.

13. The parties' proposed trial schedules anticipate trial taking place between late September and November 2012 absent the unanticipated filing of additional motions. Litigation of disputed discovery is taking place well before trial. There is no discovery or *Brady* violation in this case.

RULING: The Defense motion to Dismiss all Charges with Prejudice is **DENIED**.

So **ORDERED**: this 25th day of April 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit